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THE ANARCHISTS' CASE BEFORE THE SUPREME COURT OF THE UNITED STATES.

AMONG the *causes célèbres* of American criminal jurisprudence, the case of The People *v.* Spies *et al.*[1] will hold a prominent position. The atrocity of the act for which the defendants were prosecuted, the protracted trial, the intense popular interest in the issue, and the resort to all possible expedients to overthrow the result at which the trial court and the jury had arrived, — expedients including an appeal to the Supreme Court of the United States, and a petition for an inquiry as to the sanity of the prisoners after they had been condemned to death, — will make it a source of permanent interest to lovers of the sensational, while the points of law involved will render it worthy of the attention of the legal student.

But while the points of general municipal law raised in this remarkable case are both important and interesting, the purpose of the present article is not to consider them, but to deal with the case solely in its relation to the federal tribunal.

The circumstances which led to the prosecution of Spies and his seven associates, for the murder of Matthias J. Degan, are familiar to every one. That prosecution culminated in the judgment of the Supreme Court of Illinois affirming the judgment of Judge Gary. Then, and then only, did the opportunity occur for

[1] Reported on appeal, 122 Ill. 1; and 123 U. S. 131.

the long-threatened appeal to the Supreme Court of the United States, and, on October 21, 1887, counsel for the accused petitioned the full bench for a writ of error to the Supreme Court of Illinois, on the ground that the judgment of that court — the highest State tribunal — denied the accused rights secured to them by the Constitution of the United States.

In order to give the Supreme Court jurisdiction of such a writ of error it is necessary that the record shall show that a federal question was raised, and that the State court decided it adversely to the right claimed; and to constitute a federal question it must appear that there is, in the words of the Revised Statutes, section 709, "A final judgment or decree in any suit in the highest court of a State, in which a decision in the suit could be had, where is drawn in question the validity of a treaty or a statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under, any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity; or where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed, by either party, under such Constitution, treaty, statute, commission, or authority;" if there is, such final judgment or decree "may be reëxamined and reversed or affirmed in the Supreme Court."

In courts of limited jurisdiction, as are those of the United States, the facts requisite to give jurisdiction must appear affirmatively on the record; it is not enough that no objection is made; unless the facts plainly appear the court has no authority to pass upon any point raised, and will, of its own motion, if necessary, dismiss the case. In such a court, therefore, the primary question must always be whether the case shown is one of which it has cognizance; whether any question is presented which under its delegation of power it has a right to decide; and when this preliminary point is disposed of, the court may, and must, in the fulfilment of its solemn duties, proceed either to decide the question, if any there is, thus properly brought before it, or dismiss the whole cause as one not cognizable by it.

That it has not been customary in the practice of the Supreme Court to inquire too closely as to the existence of the necessary facts before granting a writ of error, in those cases where the writ has been granted by a member of that court, and not by the State court, appears from the frequency with which motions to dismiss for want of jurisdiction have been granted. But in the present case it seemed best, in the exercise of an undoubtedly wise discretion, in deciding the motion to grant the writ, to pass on questions more usually determined upon a motion to dismiss or affirm, to examine the record and ascertain "whether any question reviewable here was made and decided in the proper court below," and "whether it is of a character to justify us in bringing the judgment here for reëxamination."

The claim of the petitioners, as stated by Chief Justice Waite in his opinion, was substantially as follows: "1, That a statute of the State as construed by the court, deprived the petitioners of a trial by an impartial jury; and, 2, that Spies was compelled to give evidence against himself," in violation of rights secured by the United States Constitution. As to the second proposition the court was of opinion that the limits of cross-examination were not a matter of federal law, and that the constitutional objection to the use of evidence obtained by an unlawful seizure was not raised in the trial court, and therefore could not be considered; but it may be assumed, since the contrary is nowhere stated, that the accused had, at the proper time and in the proper manner, claimed a right, under the Constitution of the United States, to an impartial jury, and impeached the validity of the State jury law and the action of the State court as impairing that right. This was undoubtedly sufficient to enable the court to take cognizance, for it is firmly settled law that there is jurisdiction, however clear the question presented may be, provided it is a federal question properly raised and adversely decided; although the right claimed is wholly without foundation, it is within the power delegated to the court to pass upon it if it is claimed under the national Constitution.

But it must be borne in mind that the authority of the court is strictly limited to determining the questions arising from this claim; it gets jurisdiction, but only for a particular purpose; no questions of local law can be determined; the action of the State court other than that of denying the right asserted is not reviewable; and,

although the most palpable errors appear upon the face of the record, yet, if the federal question has been rightly determined, the judgment cannot be reversed. Such is the rule clearly deducible from the limitations set upon the federal judiciary at its creation and preserved ever since, and such is the rule consistently laid down and acted upon in the decided cases. Murdock *v.* City of Memphis, 20 Wall. 590; Bonaparte *v.* Tax Court, 104 U. S. 592. The sole question then presented to the Supreme Court in the present case, the only question which it had authority to decide, the question on the determination of which alone the course to be pursued depended, was whether or not the courts of Illinois had wrongly deprived the petitioners of a right claimed and in fact secured to them by the Constitution of the United States.

The violation alleged of the rights claimed appears to have been twofold; that the statute under which the jury was selected was unconstitutional, and that the trial judge disregarded their rights. But while the petitioners claimed that the statute was unconstitutional and that the course of the trial judge was in violation of their rights, it does not appear to have been questioned but that Judge Gary's acts were simply in execution of the statute; no claim was made that its provisions were disregarded or disobeyed, and in no proper sense does any question as to its construction appear to have been raised. It might be that Judge Gary decided erroneously the matters which the statute referred to him for decision, and if the Constitution of the United States guaranteed the accused a correct decision, this error would be a violation of constitutional rights. As the case stood, therefore, the exact question was, whether the accused had rights under the federal Constitution which a statute like that of Illinois would violate or which an erroneous decision by the trial court in executing such a law would violate, and if so whether those rights were in fact violated.

The rights asserted were claimed to be secured by Articles 4–6, and Article 14, Sect. 1, of the Amendments. The real reliance, however, must be on the Fourteenth Amendment, for it has long been settled that the first ten amendments apply only to the federal government, and the argument that their provisions are now, by Article 14, made limitations on the several States, is shortly answered by the consideration that, as the only rights and immunities secured by them are to protection against the United States, they are, while properly described as privileges and immunities

of the citizens of the United States, incapable of being embodied as limitations on State authority or of infringement by the States, even in the absence of express prohibition. Those amendments stand, therefore, precisely as they have always stood; and any rights that were drawn in question must have been rights granted by the Fourteenth Amendment itself expressly, and not by any implied application by it of preëxisting provisions to new subjects.

To establish the claim of the petitioners two elements were necessary: first, the existence of the asserted rights; second, a violation thereof; and conversely to overthrow their claim it was sufficient to show that either one of these elements was wanting; to show that the constitutional provision had not the effect claimed, or that, even if it had, full force had been allowed it.

But a notable difference exists in the character of these two elements. The former is a question of the proper interpretation of the supreme law of the land, and as such within the field over which the highest federal tribunal reigns paramount; it belongs to that class of matters which the Supreme Court of the United States is expressly designed to settle, and for the settlement of which the humblest citizen in the most trifling cause, civil or criminal, arising within the boundaries of the nation, may appeal to it. The latter is a review of the action of a court in most respects wholly independent; a proceeding allowed only as an accessory to the former, and only in cases where the former is necessarily involved. In all questions of construing and interpreting the Constitution the Supreme Court is properly and wisely ordained the ultimate source of authority, and to it all such matters may be brought by appellate proceedings; but it has no power to correct errors committed by State tribunals within their respective jurisdictions, in other matters; and in cases brought before it by writ of error because involving federal questions, its right of review is only given as necessary to a decision whether the judgment rendered shall be reversed or affirmed. Its jurisdiction is limited to the determination of federal questions, and its power to rectifying errors committed in their determination below. It is cause of regret, therefore, that the court should pursue the course in disposing of such a case of assuming, for the purposes of decision, that a right under the Constitution exists, and of limiting its investigation to considering whether in that event the proceedings in the State court were in violation of it.

Such, however, was the course pursued in the present case, for Chief Justice Waite in his opinion declares that "Before considering whether the Constitution of the United States has the effect which is claimed, it is proper to inquire whether the federal questions relied on in fact arise on the face of this record," the course of his opinion showing that by this he means whether there was any violation of the rights claimed; and he proceeds to show that "even if their position as to the operation and effect of that Constitution is correct, the statute is not open to the objection which is made against it," concluding by saying that "the federal questions presented by the counsel for the petitioners, and which they say they desire to argue, are not involved in the determination of the case as it appears on the face of the record," again meaning that the action of the State courts shows no violation of the rights, if any such exist. The federal question must arise on the face of the record, in the sense of rights claimed under the Constitution having been asserted at the proper time as an objection to the action of the State courts, else the court would have refused the writ shortly on that ground, which would of itself be absolutely conclusive. And if arising so as to make necessary a further investigation of the record, it would seem that a more proper course might have been to decide whether the rights alleged existed; for if they did not, there was no occasion to act as censor of the State of Illinois and consider the manner in which its legislature had performed its duties. And if the alleged rights had no existence it was equally unnecessary to sit as a court of review, minutely studying the evidence on which the trial judge was satisfied that individual jurors were qualified under the State laws, — a matter as to which Mr. Justice Field, delivering the unanimous opinion of the court in Hopt *v.* Utah, 120 U. S. 430, a writ of error to a territorial court, and thus bringing up the whole record for review, pronounced the opinion of the trial judge conclusive. Both of these investigations are of matters as to which, so long as the national Constitution is not violated, the States are supreme and independent; and before entering upon such a field it would seem that the question of national law, to obtain a decision on which alone these writs of error are provided, should have been first settled, in order to avoid any semblance of unwarranted interference with the State's authority.

By the course followed, the constitutional question as to the

effect of the Fourteenth Amendment remains wholly untouched, and it may, therefore be worth while to examine briefly some of the considerations and authorities relative to it.

The first section of the Fourteenth Amendment provides that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States ; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Taking up the particular provisions of the amendment, two classes of restrictions are imposed, the one protecting the privileges and immunities of citizens of the United States, and the other ensuring to all persons due process of law and the equal protection of the laws.

The equal protection of the laws obviously requires, and has always been interpreted as requiring, only that all persons shall be treated alike without distinction, and cannot possibly be infringed by the nature of a proceeding to which all persons within the jurisdiction are equally subjected, or by a decision as to the facts in a particular case. If it were alleged that a law were disregarded it might be an assertion of a violation of this right, but a decision made in executing a law cannot be a violation.

It has never been asserted that the privileges and immunities protected were all those that a citizen of the United States might have ; that a privilege once created could never be affected by State action, as, for example, by that of the State creating it. It is only those that belong to a man because he is a citizen of the United States that are rendered inviolable ; but what these privileges are has been a subject of grave divergence of opinion. It was on this point that the Supreme Court was chiefly divided in the Slaughter-House Cases, 16 Wall. 36. The majority, concurring in the opinion of Mr. Justice Miller, seem to have thought that only privileges expressly created by the Constitution, more especially those political rights given by the Thirteenth, Fourteenth, and Fifteenth Amendments, were in question. On the other hand, Mr. Justice Field expressed the view, in which Mr. Justice Swayne concurred, that certain fundamental privileges and immunities, such as inhere in the citizens of all free States, rights akin to those referred to by Mr. Justice Washington in Corfield *v.* Coryell, 4 Wash. C. C. 371, were included ; and fol-

lowing out this line in Butchers' Union Co. *v.* Crescent City Co., 111 U. S. 746, he said, "It does not limit the subjects upon which the States can legislate. . . . It only inhibits discriminating and partial enactments, favoring some to the impairment of the rights of others" (p. 759). Mr. Justice Bradley alone appears to have gone further and regarded the amendment as securing a larger class of rights.

Prof. Pomeroy concludes that the restricted view of the majority was erroneous, and that, while not formally overruled, its soundness may well be doubted; but he states the object to have been "to afford the same protection to all persons as citizens of the United States against local oppressive laws, which the Constitution originally afforded to all persons in their character as citizens of the several States; Const. Law, 3d ed., p. 528, thus, like Judge Field, assimilating the provision to Article IV. Sect. 2, Cl. 1.

Perhaps the true test is that stated by Judge Cooley in his Constitutional Principles, p. 246, that "Whatever one may claim as of right under the Constitution and laws of the United States by virtue of his citizenship, is a privilege of a citizen of the United States." In the same work, p. 245, he says, "The line of distinction between the privileges and immunities of citizens of the United States and those of citizens of the several States must be traced along the boundary of their respective spheres of action, and the two classes must be as different in their nature as are the functions of their respective governments." And he is of opinion that it may be doubtful whether the amendment has imposed any additional limitations on the powers of the States, a view in which that very discriminating foreign writer, Von Holst, in his Constitutional Law of the United States, p. 250, agrees.

In any aspect it seems clear that the amendment creates no new privileges and immunities as to judicial proceedings, except such as are included in the phrase "due process of law." If prior to the amendment the States were at liberty to try offences as they pleased, they are so still, so long as they act by due process of law. If prior to the amendment the Constitution contained no express limitation, and there was no inherent right to trial by jury, so that a State could, if it pleased, abolish that form of proceeding, that power remains, unless taken away by the express language of the amendment.

It has never been seriously asserted that formerly the States

were bound to proceed by jury trial. As said by Mr. Justice Field in the course of his dissenting opinion in Neal *v.* Delaware, 103 U. S. 370, a case not turning on this point, before the amendment no one would have doubted but that "it was competent for the States to dispense completely with juries, and to require all suits, civil and criminal, to be determined without their aid" (p. 405). See, also, Story's Commentaries on the Constitution, 4th ed., § 1947. Since, therefore, there was no privilege to trial by jury inherent in citizens of free States, such privilege, if any there is, must either be directly created by the Constitution or by the amendment in question.

It is almost needless to repeat here that the first ten amendments did not apply to the several States; and the fact that while it was deemed expedient to restrict the federal government the States were left free, is cogent to show both that there was no inherent right, else the federal government need not have been restrained, and that the States were meant to be at perfect liberty, as otherwise they would have been restricted also. Nor can it be contended that since citizens of the United States, when tried in federal courts, could claim this right, it was a privilege or immunity of such citizens, and therefore included in the phrase in the Fourteenth Amendment; for, if this right guaranteed by the Sixth Amendment has become a limitation on State authority, then equally has the right to be tried for felony only after indictment or presentment by a grand jury, and this latter proposition was expressly denied in Hurtado *v.* California, 110 U. S. 516.

It follows, therefore, that, if a right to trial by jury in criminal cases is guaranteed by the Constitution of the United States, it is solely by virtue of the requirement that no State shall deprive any person of life, liberty, or property, without due process of law.

Few more difficult questions have ever arisen than that of defining the phrase "due process of law;" indeed it may well be deemed impossible to frame a definition that shall cover all possible cases, and, as Judge Miller has said in his often-quoted opinion in Davidson *v.* New Orleans, 96 U. S. 97, . . . "there is wisdom, we think, in the ascertaining of the intent and application of such an important phrase in the Federal Constitution, by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasoning on which such decisions may be founded" (p. 104.)

It has sometimes been intimated that the phrase, closely following, as it does, the language of Magna Charta, must be given the same interpretation, with the result that nothing would be due process unless it retained the forms in use at that time. On the other hand, it is obvious that a proceeding is not due process merely because sanctioned by legislative authority.

The rule is best stated in the language used by Daniel Webster in the Dartmouth College Case: "By the law of the land [the phrase used in Magna Charta] is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is, that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society. Everything which may pass under the form of an enactment is not therefore to be considered the law of the land. If this were so, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man's estate to another, legislative judgments, decrees, and forfeitures in all possible forms, would be the law of the land." 5 Works, 7th ed., pp. 487, 488. This is cited by Von Holst as the sound doctrine, and, in accordance with it, he declares that the prohibition applies only to the most general principles, viz.: "that no one shall be convicted unheard; that the facts alleged must be examined into; and that a decision shall be made only after a legal trial of the facts in a court of competent jurisdiction." Constitutional Law, pp. 252, 253.

The question naturally suggests itself whether this provision necessitates a trial by jury; whether the right to this form of trial, unquestionably secured in prosecutions in the federal courts, is, by the Fourteenth Amendment, equally guaranteed in the State courts.

This point appears never to have been decided by the Supreme Court of the United States in respect to criminal cases. In Walker *v.* Sauvinet, 92 U. S. 90, the court held that in a civil action a jury trial was not essential to due process. Yet that the right to a jury in civil cases was regarded as of great importance is plain from the Seventh Amendment, which preserved the right in the federal jurisdiction, when the matter in dispute was more than twenty dollars; and under the constitutional provision now in question no ground for distinction in this respect,

between civil and criminal cases, is perceived, since deprivation of life, liberty, and property are classed together.

While there is no express decision, indications are not wanting of the opinion of the court that in criminal as in civil proceedings it is within the discretion of each State to regulate the matter for itself. Such was understood by Mr. Justice Harlan, dissenting, to be the effect of the opinion given in Hurtado *v.* California, *supra;* and in *Ex parte* Virginia, 100 U.S. 339, and Neal *v.* Delaware, 103 U.S. 370. Mr. Justice Field supported his dissenting opinions by arguments founded on the power of the several States prior to the Fourteenth Amendment to have abolished jury trials, and declared that that power still existed. It is worthy of note, also, that in Strauder *v.* West Virginia, 100 U.S. 303, Mr. Justice Strong referred the right of trial by jury to the State, and not to the National constitution. So, too, in Missouri *v.* Lewis, 101 U.S. 22, Mr. Justice Bradley, who in the Slaughter-House Cases evinced a disposition to carry the effect of the amendment further than any other member of the court, observed: "We might go still further, and say, with undoubted truth, that there is nothing in the Constitution to prevent any State from adopting any system of laws or judicature it sees fit for all or any part of its territory." "The Fourteenth Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two States separated only by an imaginary line. On one side of this line there may be a right of trial by jury, and on the other side no such right." 101 U.S. 31.

The last sentence clearly implies that trial by jury is not a requisite of due process of law, for it is to be borne in mind that, in relation to the federal Constitution, what is due process of law in one State will, if actually sanctioned by the local laws, be so in another. It cannot be made legal to try a criminal without a jury in California if it cannot equally be made legal in Maine. The right to due process of law is a national right, and must conform to a national standard; a form of proceeding does not meet that standard merely by virtue of its having been in use in a particular State prior to the creation of the right. No one has ever contended that the amendment was to crystallize the procedure of each State as it was found when the amendment became operative. If due process rested on the actual practice then pre-

vailing, it was "due" simply by virtue of the expressed sense of the legislature of each State, and there is no ground for saying that the sense, as then expressed, was taken, as to each State, as an immutable standard, or that a subsequent expression would not have as great effect. The United States Constitution gives its protection to every person as viewed from the national standpoint, and when it establishes a right, State lines disappear, and the measure of that right must be the same wherever, within the Nation's boundaries, it is called in question. It may be fearlessly asserted that if one State can lawfully proceed to try a criminal in a certain way, any other State may, in the discretion of its lawmakers, do the same, although that mode was adopted by the one before, and by the other after, the Fourteenth Amendment became the law of the land.

The foregoing expressions of the Supreme Court and of its individual members seem, therefore, to point clearly to the conclusion that the provision in question does not necessitate a trial by jury. This opinion is confirmed by the authority of Judge Cooley, who, in his edition of "Story's Commentaries on the Constitution," says that, so far as the first ten amendments are concerned, "The States, in the enforcement of their own laws for the preservation of peace and order, may dispense with the grand jury if the legislature shall so provide; and they may make all State offences triable before a single judge, instead of by a jury, if that mode of trial shall be thought most politic or most conducive to justice. And no more under the fourteenth article than previously can the federal government interfere with the mode prescribed for the trial of State offences: whatever is established will be due process of law, so that it be general and impartial in operation, and disregard no provision of federal or State constitution." § 1947.

But it may be urged that although trial by jury is not required, trial by a partial or biased jury is prohibited; that trial by any legally authorized and impartial tribunal may be due process of law, but that trial by a body prepossessed against the accused would not be.

This argument is not without force; while the sound discretion of legislators may deem it expedient, and equally or better calculated to secure justice, that a single judge or a bench of judges should decide all criminal cases rather than a jury, and may, by the

powers vested in them, so ordain without infringing any of those fundamental principles of right which make up due process of law, it may, notwithstanding, be true that a system which should give the decision to a body already biased, which in effect should oblige one accused of crime to plead his cause before those who had already prejudged him, would violate those fundamental principles.

It cannot, however, be asserted that on this account every trial in which the jury was not wholly impartial would fail of being due process. Such a provision as the one in question is aimed at the system, and not at the administration of it. It may well be that a State can deprive of life, liberty, and property through its judicial officers as well as through its legislative or executive branches, and if a State court should give a judgment illegal for want of jurisdiction, or kindred cause, it might be a matter cognizable and remediable by the Supreme Court; but if the State creates a system of procedure which offers protection from a partial jury, a system wholly in accord with the Constitution of the United States, and if the State courts administer justice in accordance with that system, select a jury pursuant to the rules there laid down, try the question of partiality by the methods prescribed, surely it can never be said that there has not been due process of law simply because opinions may differ as to the effect that should be given to certain of the evidence introduced to test the incidental question of partiality. Under no other section of the Constitution is provision made for overturning the decisions of the State tribunals for error unless the error is committed in the decision of a question as to the effect of the federal Constitution or the federal laws; in no other class of cases brought before it from a State court for review can the decision of a question of fact or of general law be made the basis for reversing the judgment; a State court may pronounce a contract invalid for any reason except the subsequent enactment of a statute impairing it, and although the decision may be deemed manifestly erroneous it stands as final and subject to no review. Bethell *v.* Demaret, 10 Wall. 37. The protection of an appeal to the Supreme Court of the United States is elsewhere limited to the correction of erroneous decisions of purely federal questions, and no attempt is made to supply a safeguard against errors, or even against corruption, in the State courts in other matters; yet, under this section

of the Fourteenth Amendment, efforts are made to have the entire record from the State court overhauled. Very pertinent is the language of Judge Miller in the opinion already quoted, where, speaking of this same provision, he said: "In fact, it would seem, from the character of many of the cases before us, and the arguments made in them, that the clause under consideration is looked upon as a means of bringing to the test of the decision of this court the abstract opinions of every unsuccessful litigant in a State court of the justice of the decision against him, and of the merits of the legislation on which such a decision may be founded." 96 U.S. 104.

It was said in rendering judgment in Walker *v.* Sauvinet, *supra*, where the right to a trial by jury in a civil case was claimed to be guaranteed by the Fourteenth Amendment: "Due process of law is process due according to the law of the land. This process in the States is regulated by the law of the State. Our power over that law is only to determine whether it is in conflict with the supreme law of the land, — that is to say, with the Constitution and laws of the United States made in pursuance thereof, — or with any treaty made under the authority of the United States. Art. 6, Const. Here the State court has decided that the proceeding below was in accordance with the law of the State; and we do not find that to be contrary to the Constitution, or any law or treaty of the United States." And in like manner in a criminal case, is it not true, if the State court has decided that the proceedings were in accordance with the law of the State, and that law by providing for an impartial jury has fulfilled the requirement providing for due process of law, that the court in ascertaining that the State law does so provide has discharged its mission of enforcing proper obedience to the Constitution of the United States?

Every system of procedure rests ultimately on the proper discharge of their duties by persons selected for and intrusted with the performance of those duties. The most that can be done is to secure to all persons a right to have the performance of their duties by inferior officers, ministerial or judicial, reviewed by those of a higher grade. The proper working of the most skilfully devised system will still rest ultimately on the fidelity to their trusts of certain individuals. Thus, in the selection of a jury, it is necessary that the decision as to whether an individual summoned as a

juror is or is not disqualified by partiality should be placed on some person or persons, and the best that can be done is to make a judicious selection in imposing the duty. Whether the matter be left to the discretion of the trial judge, as in Illinois, or be left to triers, according to the old practice, it will still, like other questions of fact or of mixed law and fact, be liable to erroneous decisions, and oftentimes equally discreet persons might differ in opinion as to whether bias was shown sufficient to disqualify or not. Shall it then be said that the whole matter is to be taken up to the Supreme Court of the United States, and that body be called upon to determine whether the evidence on *voir dire* as reported shows too much bias, on the ground that if it does, the accused was not given due process of law?

It is impossible to suppose that by these words is meant a correct decision of this or any other incidental question. Due process of law by a State in depriving a person of life, liberty, or property can only mean and must be taken to mean in this connection the establishment of such a system of procedure as provides for a fair trial; and if such a system is provided and acted upon by those who are intrusted with the duty, there will be no failure of due process, in the constitutional sense, although there may be a failure of justice. It consists not in reaching a right conclusion absolutely, not in trying a man by a jury utterly impartial, if partiality is in question, but in supplying the means, working as we must through human agencies, of attaining the right result; and if there is a failure owing to the defectiveness of the agencies, it is no more than often happens. Equally well might failure of a jury to arrive at the truth be deemed a lack of due process, as an error of the trial judge in determining the questions submitted to him. Neither State nor Nation can ensure that errors will not occur; and if the State has made such suitable provision as it deems best to prevent or correct errors, and has allowed the accused the benefit of those provisions, it has acquitted itself of its duties towards the nation and towards the man, and having granted him a fair opportunity for a fair trial has done all that was required.

Indeed there is much reason for the contention that the prohibition of the Fourteenth Amendment applies only to legislative action and perhaps to questions of jurisdiction. Mr. Justice Field, speaking of it in Neal *v.* Delaware, *supra*, said: "That is a provision found in all our State constitutions from the origin of the

government, and is intended to protect life, liberty and property from arbitrary legislation." Those cases which arose under the civil rights legislation, concerning the exclusion of negroes from juries when the accused was a colored person, if they are still to be regarded as law, must be deemed rather cases of denying the equal protection of the laws, since there the juries were not drawn professedly in accordance with the State statutes. No case has been found going to the extent of saying that action of a State court in professed obedience to a constitutional law and making no discrimination of race or color can be assailed as a violation of the Fourteenth Amendment. The statute to be applied unquestionably may be, and its constitutionality is to be determined ; but the acts of the State tribunals, it is believed, so long at any rate as they do not repudiate the statute, cannot be impeached. Thus where the question was whether a man had been deprived of an office without due process of law by proceedings under a State statute, it was said: "It is substantially admitted by counsel in the argument that such is not the case, if it has been done, in the due course of legal proceedings, according to those rules and forms which have been established for the protection of private rights We accept this as a sufficient definition of the term 'due process of law,' for the purposes of the present case. The question before us is, not whether the courts below, having jurisdiction of the case and the parties, have followed the law, but whether the law, if followed, would have furnished Kennard the protection guaranteed by the Constitution. Irregularities and mere errors in the proceedings can only be corrected in the State courts. Our authority does not extend beyond an examination of the power of the courts below to proceed at all." Kennard *v.* Louisiana, 92 U. S. 480, 481.

The ultimate question really is whether, by the Fourteenth Amendment, the Supreme Court of the United States is vested with authority to review the decisions of the State courts in all matters, criminal and civil, to determine whether State laws have been correctly interpreted and enforced. If due process of law depends upon the correct determination of facts or issues arising in the enforcement of local statutes, then in every case it becomes a federal question,— that is, a question arising under the Constitution and laws of the United States,— whether those facts and issues have been rightly found. If, such a question being brought before it, the court, by virtue of its duty to see that the Constitu-

tion is obeyed, is required or empowered to determine the soundness, in fact or law, of the decision of the State court, then in every case a separate investigation must be made by it of the proceedings appealed from; and it will not be bound to follow the State decision, although the latter was on a point of local law. And if an alleged error of Judge Gary, in being satisfied that the jurors Sanford and Denker were not disqualified under the jury law of Illinois, would give the Supreme Court of the United States a right or a duty to consider in detail the examinations of those jurors, in order to determine whether he was properly so satisfied, and empower it to reverse his judgment and that of the Supreme Court of Illinois, on being convinced that he was in error, as the course of the court seems to indicate, then the Fourteenth Amendment has given the Supreme Court jurisdiction on writ of error to the State courts practically in all cases; a jurisdiction wholly unshackled by the limitations imposed in cases coming from the inferior federal courts.

It is preposterous to attribute any such sweeping effect to the amendment. That amendment was adopted under special circumstances, and chiefly, at any rate, to secure a special object,—the establishment of the enfranchised negroes of the South on a basis of equal rights with other citizens. It may be that a broader object was also in view; that, as said by Mr. Justice Bradley in the Slaughter-House Cases, *supra*, it was aimed at the spirit of insubordination to the national government that had been displayed; but, without restricting it to its effect in securing to the negroes their newly-granted equality, it is not improper to consider in construing it what its immediate purpose was.

Nor are the same principles of interpretation to be followed where a provision of the organic law is in question that prevail in determining the effect of a private instrument. The spirit must be followed rather than the letter, and that construction adopted which shall do most towards harmonizing the whole. The mere literal meaning of the words is not to be given undue importance, but the pervading sense of the whole is to be kept in view. When Chief Justice Marshall, the creator of American constitutional law, found authority for Congress to charter the Bank of the United States, he was not guided solely by the written words of the Constitution. The right to issue a paper currency is not contained expressly in any grant of powers. The conclusions reached

in McCulloch *v.* Maryland and Juillard *v.* Greenman are attained by considering the Constitution in its entirety, and interpreting it in a broad spirit calculated to give it effect as an entirety. And in like manner, when the other scale is uppermost, when it is a question, not of curtailing the national government in the functions of nationality, but of abridging the independence of the several States in the functions of local government, the same spirit should prevail ; and unless a breach in the symmetry of the Constitution is clearly intended,in determining which the circumstances attending the adoption of an amendment are significant, the construction should be adopted, as far as possible, which will fit into and fill out the body of the instrument rather than violently disrupt it.

Thus, in considering the force and effect of the Fourteenth Amendment, the mere ordinary import of the words used is not to prevail exclusively ; it cannot be disregarded, indeed, but it should be made to a large degree subordinate to the spirit, keeping in view the particular ends designed to be corrected, and the connection with the rest of the Constitution.

The fundamental plan of our scheme of government is the dual sovereignty of the State and of the Nation. Certain fields have been assigned to each, and, without destroying the very framework of the system, neither can be largely encroached upon. The great prevailing idea is that of local self-government coupled with a nationality complete in all things pertaining to the people as a whole. The due administration of its laws, free from control or supervision, was carefully preserved to each State, so long as its laws concerned its internal affairs and government only, and violated none of the fundamental rights specified, beside which may well and properly be classed the right not to be oppressed by arbitrary legislation. But it was never designed that the State administration of justice should be reviewable by the federal courts for the purpose only of correcting errors committed as to matters pertaining to the State, or of enforcing obedience to State laws. Unless, therefore, the intention is plain, no construction should be given that will disturb this fundamental division of powers, and overturn the local independence.

So far from such a construction being required, there seems to be nothing in the language or spirit of the Fourteenth Amendment warranting it ; and this is further supported by the history of its

adoption. It can hardly be supposed that this part of the first section, if designed radically to alter the distribution of powers, would have passed through Congress almost unnoticed. Yet such is the case; while Charles Sumner, and Henry Wilson, and other leading statesmen of the period were hotly disputing over other provisions, this one was allowed to pass wholly undiscussed, and almost unmentioned. If its effect was only to reënforce provisions already found in most, if not all, of the State constitutions, to prevent wilful violations by legislation of certain principles of fundamental justice, which, except under the influence of popular passion, would never be violated, while an important development, it would not be a wide departure, and its failure to attract attention is readily understood.

That such is the proper interpretation is deducible alike from the spirit that pervades it, from its relation to the body of the Constitution, and from the decisions as to its effect. There is no indication in the amendment itself that it was designed to enlarge the jurisdiction of the federal Supreme Court by imposing the requisite of due process of law on the part of the States, and it is indeed fairly inferable from the language used that the chief object was, as stated by Judge Cooley (Constitutional Limitations, 5th ed., p. 359, note 3), to preclude legislation. In this sense only is it an outgrowth of, rather than an excrescence upon, the original instrument. And although a few expressions may be found in the reports suggesting that it has a more sweeping effect, no case has yet gone so far as would be required in order to say that any part of the proceedings in the *Anarchists' Case* was within the scope of the amendment, or that anything in the case except the validity of the jury law of Illinois would fall within its purview.

The intensity of the struggle to preserve nationality and the difficulties of the reconstruction period have created a tendency to look upon the national government as the source of protection in cases where personal rights are concerned, even when they are rights granted by the States themselves, and guaranteed by their constitutions. In avoiding the perils of dissolution, the not less perils of too great centralization have come to be disregarded, and a latitudinarian spirit of construction would obliterate the landmarks set by the founders of the nation, and erect upon the basis of the Fourteenth Amendment a new judicial system with the Su-

preme Court at Washington as a final court of appeal from all tribunals, state and federal.

But although the Civil War has decided, more effectively than any judicial opinion, that we are a nation, and the amendments growing out of that great epoch have provided that citizenship in the nation shall not depend on race or color, and that there shall be no discrimination between citizens by a State, it has not yet been decided or provided that the independence as to local matters, which forms the strongest bulwark against that disintegration so often predicted, has ceased, and that the State in the administration of its laws is to be subjected to the surveillance of the national courts. And it is to be deplored that the Supreme Court of the United States, upon which chiefly rests the responsibility for preserving the proper relation of dependence and independence between things national and things local, should have adopted a course which may tend to countenance such an idea.

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A CREDITOR'S RIGHT TO HIS SURETY'S SECURITIES.

THE question for discussion is whether a debtor can pledge his property so as to indemnify his surety, without giving the creditor a preferred claim on the indemnity fund. In such a case it is not contemplated that the surety shall pay the debt out of the security in the first instance, but if through default of his principal he should be obliged to pay out of his own property, it is intended that he shall have recourse to the fund for reimbursement. One must distinguish carefully between three classes of cases: first, those in which the security is given primarily for the better protection of the debt; second, those in which the surety has the power, though not the duty, to apply the security in discharge of the debt; third, those in which the security is given merely for the purpose of indemnity. In the first class there can be no question that the creditor has the rights of any *cestui que*